

***United States Court of Appeals
for the Second Circuit***

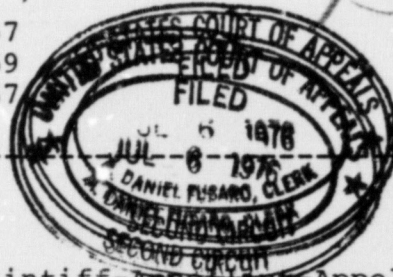


**PETITION FOR
REHEARING**

75-7457
VB
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 75-7457
75-7459
75-7467



JAMES MORRISSEY,

Plaintiff-Appellant-Appellee,

v.

NATIONAL MARITIME UNION OF AMERICA,

Defendant-Appellant-Appellee,

and

JOSEPH CURRAN, SHANNON J. WALL
and CHARLES SNOW,

Defendants-Appellants.

PETITION FOR REHEARING AND
FOR REHEARING IN BANC

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT:

Defendant-Appellant, Joseph Curran, respectfully
petitions the Court for Rehearing and for Rehearing in Banc,
and in support thereof states as follows:

This is an appeal from a judgment of the United States
District Court for the Southern District of New York which
awarded substantial punitive damages to the plaintiff for

malicious prosecution. One of the principle issues raised on appeal was the defendant's contention that the District Judge had erred in refusing to grant an adjournment at the trial when it unexpectedly developed that the principal defendant in the suit, Joseph Curran, would not be available at trial because he had to undergo immediately, non-elective surgery for the removal of a cancerous tumor. The panel of this Court which heard the appeal stated that it "would have been happier if a continuance had been granted", but declined to do so because trial counsel for Curran had failed to "make an offer of proof concerning what material testimony, prejudicial by its absence, Curran might have given in person". (Slip Opinion, page 4424) It is respectfully submitted that the failure to order a new trial under these circumstances because of trial counsel's failure to make an offer of proof not only unreasonably penalizes the individual defendants for what might be regarded as an error of counsel but, more important, overlooks the fact that the prejudice to a successful defense resulting from the absence of the principal defendant in an action of this nature could not possibly be cured by an offer of proof, and the failure to make an offer of proof is simply too technical and fragile a basis for denying substantial justice to the defendant.

The circumstances giving rise to Curran's unexpected unavailability at the time of trial are as follows. The trial of this action was reassigned to the Honorable Robert J. Ward under the Southern District of New York's "Crash Program".

Judge Ward held a pretrial conference on Friday afternoon, April 4, 1975, at which time he directed the case go to trial ten days later on Monday, April 14, 1975. The following Monday, contact was made with defendant, Curran, who was retired and living in Florida, to advise him to be available in New York for the trial on April 14, 1975. Curran then informed counsel that he had just undergone a series of medical tests, and, if they proved unfavorable, he would have to enter the hospital on Monday, April 14, 1975, for removal of a cancerous tumor from his colon. The results of the test proved to be unfavorable and this was communicated to trial counsel who contacted Judge Ward and requested an adjournment of the trial. Judge Ward denied this request, stating that Mr. Curran's pre-trial deposition could be used in his absence.

Curran did, in fact, enter the hospital on Monday, April 14, 1975, the day the trial began and underwent surgery the morning of April 16, 1975, while plaintiff was still presenting his case and before the Court could rule on the Motions at the end of plaintiff's case. Subsequently, substantial punitive damages were awarded against Curran.

Where the credibility of a witness is at issue, and that certainly was true as to Curran's testimony in the instant case, no offer of proof can substitute for the appearance of the witness on the witness stand. The making of an offer of proof requires consultation with the

malicious prosecution. One of the principle issues raised on appeal was the defendant's contention that the District Judge had erred in refusing to grant an adjournment at the trial when it unexpectedly developed that the principal defendant in the suit, Joseph Curran, would not be available at trial because he had to undergo immediately, non-elective surgery for the removal of a cancerous tumor. The panel of this Court which heard the appeal stated that it "would have been happier if a continuance had been granted", but declined to do so because trial counsel for Curran had failed to "make an offer of proof concerning what material testimony, prejudicial by its absence, Curran might have given in person". (Slip Opinion, page 4424) It is respectfully submitted that the failure to order a new trial under these circumstances because of trial counsel's failure to make an offer of proof not only unreasonably penalizes the individual defendants for what might be regarded as an error of counsel but, more important, overlooks the fact that the prejudice to a successful defense resulting from the absence of the principal defendant in an action of this nature could not possibly be cured by an offer of proof, and the failure to make an offer of proof is simply too technical and fragile a basis for denying substantial justice to the defendant.

The circumstances giving rise to Curran's unexpected unavailability at the time of trial are as follows. The trial of this action was reassigned to the Honorable Robert J. Ward under the Southern District of New York's "Crash Program".

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Where the credibility of a witness is at issue, and that certainly was true as to Curran's testimony in the instant case, no offer of proof can substitute for the appearance of the witness on the witness stand. The making of an offer of proof requires consultation with the

witness and knowledge of precisely^{on} what issues testimony from that witness will be needed. Regardless of how broad and how extensive pre-trial discovery may have been, it is rare that defense counsel truly knows what evidence he will offer in defense until the plaintiff has rested his case and the trial court has ruled on Motions at the end of the plaintiff's case, for until then, defense counsel does not know what evidence will actually be offered and what will be admitted.

Particularly where the absent witness happens to be the principal defendant, matters may arise during trial the answers to which the party may know but counsel may not simply because they never came up before. Thus, the right to make an offer of proof can never be a meaningful substitute for being able to consult with a client as to the course and direction of the defense. In the instant case, Curran did not know that he actually would have to undergo surgery until the Wednesday before the trial, and was in the hospital during that trial. In that period of time there simply was no way that counsel could consult with him and prepare any meaningful offer of proof.

Even if there were opportunity to prepare a meaningful offer of proof, which there was not, such an offer of proof would in no way be a substitute for the basic and fundamental right, inherent in the concept of due process, to confront one's accusers. Curran was denied this right. Any attempt to

evaluate whether the verdict would have been greater or less had he been available at the trial misses the point that he still should have had the right to be there. That any defendant should have to enter a hospital for serious cancer surgery only to come out of the anesthesia to find a substantial verdict has been awarded against him in his absence is simply too great a price to pay for the desire to dispose of cases.

Because Curran was denied the right to confront his accusers, because he was denied the right to testify personally thereby lending greater credibility to his testimony, and because he was denied the opportunity to actually participate in his own defense, he was denied a fair trial. Under these circumstances, we submit that it was error to deny the request to adjourn the trial, an error which this Court should correct by ordering a new trial.

Conclusion

For all the foregoing reasons, it is respectfully submitted that this Petition for Rehearing and Rehearing In Banc should be granted to the end that a new trial may be granted.

Defendant-Appellant, Shannon J. Wall and Charles
Snow, join in this Petition.

Respectfully submitted,

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